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NTSB Order No. EA-3918

UNITED STATES OF AMERICA  
**NATIONAL TRANSPORTATION SAFETY BOARD**  
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD  
at its office in Washington, D.C.  
on the 10th day of June, 1993

JOSEPH M. DEL BALZO,	)	
Acting Administrator,	)	
Federal Aviation Administration,	)	
	)	
Complainant,	)	
	)	Docket SE-11550
v.	)	
	)	
SEPER HEDAYAT-ZADEH,	)	
	)	
Respondent.	)	
	)	

**OPINION AND ORDER**

The Administrator has appealed from the oral initial decision of Administrative Law Judge William E. Fowler, Jr., issued on July 17, 1991, following an evidentiary hearing.<sup>1</sup> The law judge dismissed an order of the Administrator suspending respondent's airline transport pilot certificate for 30 days based on allegations that he violated 14 C.F.R. 91.7(a) and (b)

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<sup>1</sup>The initial decision (ID), an excerpt from the hearing transcript, is attached.

and 91.13.<sup>2</sup> We deny the Administrator's appeal.<sup>3</sup>

Respondent was non-flying, pilot-in-command of a Tower Airlines' Boeing 747 passenger-carrying flight from Gardermoen Airport, Oslo, Norway to John F. Kennedy Airport, NY. Because the runway was short and the aircraft close to maximum takeoff weight, a so-called static takeoff was performed (a routine measure in these circumstances at this airport).<sup>4</sup> From the events that followed and the evidence in the record, this procedure apparently puts greater stress on the runway due to the higher thrust created. Thus, when the 747 took off, considerable portions of the runway broke apart. At least three flight attendants saw the asphalt pieces of the runway being blown up around the back of the aircraft. Exhibits A-6-8. One reported

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<sup>2</sup>§ 91.7 **Civil aircraft airworthiness.**

(a) No person may operate a civil aircraft unless it is in an airworthy condition.

(b) The pilot in command of a civil aircraft is responsible for determining whether that aircraft is in condition for safe flight. The pilot in command shall discontinue the flight when unairworthy mechanical, electrical, or structural conditions occur.

§ 91.13 **Careless or reckless operation.**

(a) *Aircraft operations for the purpose of air navigation.* No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.

<sup>3</sup>Respondent appealed the law judge's decision denying his motion to dismiss. In light of our denial of the Administrator's appeal, we need not address either respondent's standing to appeal or the merits of his claim.

<sup>4</sup>In a static takeoff, the brakes are not released until the engines are producing full thrust.

hearing "a loud bang as the asphalt hit the fuselage." Exhibit A-8 and Tr. at 54.

The extent to which this information was communicated to respondent via the in-flight manager (IFM), Mr. Castenada, is a key part of the dispute before us and is discussed in detail below. The airport tower advised: "you blew up the asphalt layer in the very south end of the rwy [runway] and there was coming debris after you." Exhibit A-14 tower transcript. The tower, however, focussed on whether the tires had blown in takeoff. All indications, including a check of the runway for rubber -- a check made at respondent's request -- were that the tires were intact. The tower, thereafter, was satisfied, and wished the aircraft a good flight. Id. The aircraft continued its flight with no further incident or abnormality, and all instruments showed normal readings. However, on arrival in New York and inspection of the aircraft, it was clear that it had sustained considerable damage. Exhibit A-10.<sup>5</sup>

The law judge found (ID at 54), and there is no dispute, that the damage made the aircraft unairworthy and that respondent had no personal knowledge of the events, being in a position where he would neither hear nor see the flying asphalt.<sup>6</sup> The issue on which the parties disagree is whether, based on the

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<sup>5</sup>Tr. at 139, 175, 188-189. There is no evidence that the aircraft's handling necessarily would have exhibited the effects of the damage.

<sup>6</sup>The law judge also found that the flight attendants did not know of any damage to the aircraft. ID at 56.

information obtained from IFM Castenada and the Oslo tower, a sufficient question should have been raised in respondent's mind to require him to discontinue the flight.

On appeal, the Administrator argues (citing Administrator v. Dailey, 3 NTSB 1319 (1978) and Administrator v. Parker, 3 NTSB 2997 (1980)) that respondent did violate the cited regulations because a reasonable and prudent pilot would have concluded from the information respondent had that there was the possibility that the aircraft was unairworthy. Appeal at 12. The law judge declined to make such a finding and, although we agree with the standard to be applied, the facts of record support the law judge's dismissal of the complaint. The flaw in the Administrator's appeal is that he makes factual assumptions the record will not support.<sup>7</sup>

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<sup>7</sup>The Administrator relies heavily on factual assumptions based on the law judge's subsidiary findings (see, e.g., Appeal at 12). To some extent, this reliance is misplaced. For example, the Administrator assumes the law judge found that respondent knew of the loud bang (and should have acted on it). The Administrator so concludes because the law judge found that Mr. Castenada "said he would inform the cockpit of same, and he did." Tr. at 56. This, however, is not the same as a specific finding by the law judge that respondent knew of the loud noise.

Indeed, other discussion by the law judge can be read as acknowledging that only the flight attendants, not respondent, knew of the noise (Tr. at 59, lines 1-10). In any event, as next discussed, there is nothing in the record that will support a finding that respondent knew. And, elsewhere in his appeal, the Administrator is not so convinced. Appeal at 17, note 3 ("The Administrator notes that the ALJ does not clearly find whether Respondent was informed of Mr. Castenada's comments to the cockpit."). Remand, as suggested there by the Administrator, is not necessary, as we can analyze the evidence. In view of Mr. Castenada's testimony, no issues of credibility are involved here.

Mr. Castenada's written reports of the incident indicate that he notified the "cockpit," not necessarily the captain, and that his conversation with a cockpit crewmember led him to believe the cockpit crew knew all the details. Exhibits A-1-2 and R-1. At the hearing, Mr. Castenada admitted that he did not recall mentioning to the cockpit crew the loud noise that was heard. Tr. at 35, 48. There is nothing in the IFM's written or oral testimony, either, to indicate that the IFM spoke to respondent, that respondent heard the conversation, or that Mr. Castenada communicated details to anyone in the cockpit sufficient to raise concern. On direct examination, the Administrator did not elicit from Mr. Castenada the exact language he used, and his written statements of the incident are not useful in trying to determine exactly what he said.

Further, respondent testified that he did not hear or see the IFM in the cockpit, being involved with tower communications.

The two other cockpit crewmembers supported this claim. Tr. at 176-177, 192. Flight Engineer LaFosse believed that he was the one who actually spoke with IFM Castenada, and First Officer Parks, the flying pilot on the flight, acknowledged that he heard the IFM, but that what he heard caused him no concern. According to both LaFosse and Parks, the IFM only reported the disturbance in a general sense.<sup>8</sup> As considerable dust, stones, and other

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<sup>8</sup>Mr. Parks testified that the IMF said that things were "really blowing around" behind the aircraft on takeoff (Tr. at 173). Mr. LaFosse testified to the IMF saying: "there sure was a lot of dirt and dust and everything flying on that take off." Tr. at 189.

debris are normally thrown up by the aircraft on a static takeoff, these gentlemen testified (see, e.g., Tr. at 189), there was no reason to think anything was wrong. Thus, the Administrator failed to establish that respondent even knew the IFM had communicated to the cockpit crew regarding the incident and, even if he is held to knowledge of communications with his crew (which he is not), the record can only support a finding that what Mr. Castenada said was susceptible of more than one meaning. Thus, we cannot find that Mr. Castenada's testimony supports a finding that, based on it, respondent should have questioned the airworthiness of the aircraft.

Similarly, we cannot find the law judge erred in failing to find that respondent's communications with the Oslo tower should have put him on notice of the possible unairworthiness of his aircraft. Although the tower spoke of asphalt debris, it advised respondent only of its concern for the tires, and otherwise implied that all was well. Exhibit A-14 at time 1522. (It appears that a language barrier may have contributed to the lack of full communication. See, e.g., "there was coming debris after you.") Moreover, because jet blast of a static takeoff normally produces considerable debris of various sorts, a more direct, detailed communication would have been necessary fairly to give notice that something out of the ordinary was happening.

Overall, it appears that respondent's failure to appreciate the extent of the potential problem stemmed not from his failure to act properly on information before him, as the Administrator

claims, but from a more basic failure to have the actual information put before him.

**ACCORDINGLY, IT IS ORDERED THAT:**

1. The Administrator's appeal is denied; and
2. Respondent's appeal is dismissed as moot.

VOGT, Chairman, COUGHLIN, Vice Chairman, LAUBER, HART and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.